International Longshoremen's Association, Local 1969, Great Lakes District Council, Atlantic Coast District, AFL–CIO (Shore Services) ***and*** **Jesse Martinez.** Case 25–CB–7938

June 24, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 16, 1999, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, International Longshoremen's Association, Local 1969, Great Lakes District Council, Atlantic Coast District, AFL–CIO, Portage, Indiana, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Make whole Jesse Martinez for any loss of earnings suffered as a result of the discrimination against him by payment to him of sums of money and other benefits equal to that he would have earned; restore him to the job referral seniority rank he would have been entitled but for the Respondent's discrimination against him; and refer him to employment with all employers with which the Respondent has a referral agreement, other than Shore Services and Lakes and Rivers Transfer, in accordance with hiring hall rules, in the manner set forth in the remedy section of the decision."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Rescind the October 24, 1996 letter advising Jesse Martinez that he was not eligible for employment with any employer with which the Respondent has a referral agreement; and within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to refer Martinez for employment with any employer with which it has a referral agreement, other than Shore Services and Lakes and Rivers Transfer, and within 3 days thereafter notify Martinez in writing that this has been done and that the refusal to refer him will not be used against him in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to refer Jesse Martinez, our member in good standing, to employment by employers with which we maintain an exclusive hiring hall agreement at the Port of Indiana, excluding Shore Services and Lakes and Rivers Transport.

WE WILL NOT in any like or related manner breach our duty of fair representation for all our members in the operation of our hiring hall.

WE WILL maintain and operate our hiring hall and job referral system in a nondiscriminatory manner.

WE WILL make whole Jesse Martinez for any loss of earnings suffered as a result of the discrimination against him by payment to him of sums of money and other benefits equal to that he would have earned; restore him to the job referral seniority rank he would have been entitled but for our discrimination against him; and refer him to employment with all employers with which we have a referral agreement, other than Shore Services and Lakes and Rivers Transfer, in accordance with hiring hall rules.

WE WILL rescind the October 24, 1996 letter advising Jesse Martinez that he was not eligible for employment with any employer with which we have a referral agreement; and WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to refer Martinez for employment with any employer with which we have a referral agreement, other than Shore Services and Lakes and Rivers Transfer, and WE WILL, within 3 days thereafter, notify Martinez in writing that this has been done and that the refusal to refer him will not be used against him in any way.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1969, GREAT LAKES DISTRICT COUNCIL, ATLANTIC COAST DISTRICT, AFL–CIO

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(b)(1)(A) and (2).

[2] The General Counsel has excepted to the judge's failure to order the Respondent to rescind its October 24, 1996 letter to Jesse Martinez, to refer Martinez to employment with all employers with which it has a referral agreement, other than Shore Services and Lakes and Rivers Transfer, in accordance with hiring hall rules, and to remove from its files any reference to its failure to refer Martinez to employment with any employer with which it has a referral agreement, other than Shore Services and Lakes and Rivers Transfer. We agree with the General Counsel that it is appropriate to include these additional measures as part of the remedy for the violations found in this case; and we amend the remedy, the recommended Order, and notice accordingly.

Belinda J. Brown, Esq., for the Acting General Counsel.
Fred W. Grady, Esq., of Valparaiso, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The original charge in this proceeding was filed on November 15, 1996, by Jesse Martinez, an individual, against International Longshoremen's Association, Local 1969, Great Lakes District Council, Atlantic Coast District, AFL–CIO (the Respondent) and thereafter was amended on July 22, 1997. On August 29, 1997, the Regional Director for Region 5 issued a complaint against the Respondent which alleged that it violated Section 8(b)(1)(A) and (2) of the Act by contravening its own job referral rules in the operation of an exclusive hiring hall for several employers with which it has contracts in the Port of Indiana, and by refusing to refer Martinez, a bargaining unit employee, to available bargaining unit work offered by those employers since about October 24, 1996.

The Respondent filed a timely answer and denied the commission of any unfair labor practices.

The trial of this matter was held before me on July 29, 1998. At the trial, the parties were given full opportunity to adduce relevant testimonial and documentary evidence and to argue orally. They were also afforded opportunity to submit posttrial briefs. On September 14, 1998, the General Counsel and the Respondent filed exhaustive briefs.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs, and my observation and evaluation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

It is alleged and admitted at all material times, Shore Services, a corporation, with an office and place of business in Portage, Indiana, has been engaged in the provision of stevedoring services which, in the course of its business operations during the past 12 months, provided services valued in excess of $50,000 for Beta Steel Corp., an enterprise within the State of Indiana, which, in turn, in the course of its own business operations in the same 12 months, purchased and received at its Portage, Indiana facility, goods valued in excess of $50,000 directly from points outside the State of Indiana.

It is admitted, and I find, that at all material times Shore Services has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that at all material times Beta Steel Corp. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1]

[1] Documenting evidence in the record reveals that Shore Services is a division of Beta Steel Corp., erroneously referred to in the transcript as Beda.

II. THE LABOR ORGANIZATION

At all material times, the Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Respondent's office and place of business, i.e., the union hall, is located at the Port of Indiana in Portage, Indiana. It is admitted that at that location, the Respondent serves as the exclusive source of employee referrals for employment with Shore Services and other employers pursuant to collective-bargaining agreements between several employers, including Shore Services and the Respondent. At the time of the trial, the Respondent maintained collective-bargaining agreements with the following employers for work at the Port of Indiana: Lakes and Rivers Transfer, a division of Jack Grey Transport; Shore Services, Inc.; Brown Incorporated; Rogers Grain and Terminals; American Grain, S. H. Bell and Tanco Terminals. With the exception of S. H. Bell and Tanco Terminals, these agreements are virtually identical. S. H. Bell and Tanco Terminals maintain a special cargo agreement with the Respondent that is related to the type of work that they perform. Under that contractual agreement, the Union refers members to requesting employers pursuant to a hiring hall system. Designated representatives of each company under contract with the Respondent telephone the Union each day to request job orders for that evening or the next day. These job orders constitute the work available for each day. Each prospective employee seeking work must telephone the Respondent by 4 p.m. each day to learn of work orders for the following day and must appear at a "shape" at the Respondent's union hall at 7:45 a.m. each morning. The union agent, i.e., "expeditor," announces each employee's name in order of seniority rank and that employee then approaches the representative of whichever company he or she chooses to work for that day. If individuals do not obtain work at the initial shape, they then execute a sign-in sheet providing the Respondent their names, referral numbers, telephone numbers, and referral seniority rank positions. If work becomes available later, the individuals on the sign-in sheet are contacted.

Jesse Martinez has been a member of the Respondent's Union since 1972. As of October 24, 1996, Martinez ranked number nine on the Respondent's seniority list. Until October 24, 1996, he had been referred out of the Respondent's hiring hall for work almost daily. On October 23, Martinez was accusing of leaving his work area without permission or, as it is called, "jumping vessel" while working for Shore Services. As a result of this accusation, the Respondent was notified by Shore (Beta Steel) that Martinez should not be referred to them in the future. By letter dated October 24 from Andre Joseph, the Respondent's business agent and expeditor, Martinez was notified that he would no longer be referred out of the union hall for work with any employer under contract with the Respondent.

As business agent and expeditor, Joseph described himself as chief steward on the docks. He is utilized by the various employers to refer out employees and to operate and oversee the referral hall. His job is to place employees and deal with any problems that come up with the discharging and loading of cargo.

The Respondent admits that this letter was sent but claims that it was sent in error and Martinez should only have been barred for referrals from Lakes and Rivers Transfer (Lakes) and Shore, and that Martinez was eligible to work for any of the other employers from whom the Respondent accepted referrals. Shore and Lakes had entered into a reciprocal agreement whereby neither Company will accept referrals of employees discharged from the other. However, the Respondent admits that it did not subsequently send a letter correcting its erroneous October 24 correspondence.

It is undisputed that a refusal to refer Martinez from any nonreciprocal employer would have been a violation of the Respondent's own rules and practices. It is also undisputed that on and after October 24, 1996, Martinez was not referred to any employer who requested referrals at the Port of Indiana from the Respondent. It is disputed whether after October 24, 1996, Martinez did make himself available at the daily shape for such referral. The General Counsel alleges that the erroneous letter was reinforced by similar oral statements made to Martinez by Joseph on October 24 and 25, 1996. The Respondent argues that despite the erroneous letter, Martinez was orally informed that he was eligible for referrals to nonreciprocal employers but chose not to make himself available for work because such work was in fact so minimal that it was not worth his effort to do so. It is undisputed that the vast preponderance of work available through the hiring hall was for the reciprocal agreement employers.

Whether Martinez' discharge was warranted is not in issue. It is undisputed that jumping a vessel universally warrants discharge. There is no allegation that the Union failed to represent or improperly represented Martinez on the discharge issue. Indeed, Martinez filed no grievance against Shore and gave no response when asked in direct examination by the General Counsel why he did not. He did mumble something to the effect that he believed that he would not receive proper representation. There is no evidence in the record to sustain such belief. Although Martinez was somewhat involved in internal union politics by running for office and regularly attending executive board meetings and general membership meetings, the record is barren of any Respondent animosity related to this activity. In fact, Martinez testified that he has maintained a personal friendship and socialized with all members of the Local Union and, thus, he had no political enemies.

The first issue is whether the October 24 letter was sent in error or was intentional. Second, if sent in error, is the Respondent culpable for the erroneous notification of universal nonreferral in the Port of Indiana negligently sent to Martinez and never rescinded in writing thereafter? In factual dispute are conversations and alleged oral statements made to Martinez by Joseph relating to the nature of his nonreferral which either reinforced or mitigated its effect.

2. The nonreferral

On October 23, Joseph received an electronic facsimile (fax) message from Shore Services notifying him of Martinez' work abandonment and subsequent discharge. Joseph proceeded to the jobsite to investigate. Martinez had been referred there as a general laborer.

On October 24, Martinez appeared at the union hall, annexed to which is an open-air platform from which the expeditor announced the jobs available and the names of applicants eligible by seniority rank for that job in descending seniority level. There is a dispute as to when, how, and where Martinez encountered Joseph and what was said between them on that day and also the next day.

On October 24, according to Joseph, Martinez appeared at the morning shape and the following events occurred. Joseph announced his name from the list. At that point, Martinez started to approach Edward Bundy. The latter is the terminal head checker and hiring agent for Lakes. As is customary, he was present to accept the referred employee for requested work. Joseph testified that he interrupted Martinez' approach to Bundy by telling him that Shore had discharged him for jumping vessel. He then told Martinez that he was being "nonreferred" from Lakes because of a reciprocal agreement it had with Shore not to hire employees discharged from one of them, but that he could work for other employers. Joseph testified that he announced Martinez' name because there was work available that morning from a third employer present, as Martinez did not deny and other witnesses corroborated, i.e., S. H. Bell. According to Joseph, he and Martinez engaged in a conversation in which Joseph found himself repeating what he had said. Joseph terminated it so that he could continue the interrupted shape by telling Martinez to see him afterward in the union office. According to Joseph, after the shape, he explained to Martinez in the office that he had investigated the discharge from Shore by interrogating the three shuttle drivers on duty there on October 24 as to whether any of them might have authorized Martinez' early departure and that none of them did so. Joseph testified that he again repeated to Martinez that he was nonreferred from Shore and Lakes but could work for Bell and others. However, Martinez departed and did not appear for a shape thereafter.

One of those shuttle drivers, Richard Ponda, testified with no controverting rebuttal that on the morning of October 24, upon his arrival before the shape, near the union office at shed 2 at the dock, Martinez asked him to falsely tell Joseph that he had authorized the early departure on October 23. Ponda refused and proceeded to the shape area where Martinez again made the request and he refused, at which point Joseph commenced the shape. Ponda heard Joseph tell Martinez, who stood near Ponda, that he could work for neither Shore nor Lakes but that he could work for Bell and other companies. Donald R. Snyder, the terminal head checker for Shore, testified that he was present at the shape on October 24 and was situated between Bundy and Martinez. He corroborated Joseph and Ponda as to what was said by Joseph outside of the office. The position of head checker is obtained by joint employer and union appointment, of which Snyder testified that Joseph "probably" had some input. Sndyer has been a head checker for over 22 years.

Martinez' account differs from that of Joseph. Martinez testified that when he arrived at the union hall on October 24 before the shape, Joseph approached him and invited him into the office where they spoke. Joseph denied such encounter.

Snyder testified that on October 24, as he sat drinking coffee in the kitchen area of the office building located between the front door and rear inner office, as was his custom, he never saw Martinez enter. However, he in effect admitted the possibility that Martinez might have entered unobserved by him.

Martinez testified that Joseph told him that because he had jumped vessel, he was being nonreferred from Shore. Martinez claimed that a shuttle driver released him but Joseph dismissed that claim. According to Martinez, he told Joseph that the wanted to file a grievance against Shore to which Joseph now responded that he did not care what kind of grievance he filed,

he was "non referred through the hall." No grievance was filed. According to Martinez, he did not attend the morning shape at all on October 24 but, instead, proceeded one-fourth mile away to the Shore yard where, for a few minutes, he engaged in a brief conversation with its supervisor, Susan Mayer, wherein he asked whether she had any problem with his work, whether he was nonreferred from Shore, and was told she was unaware of a problem and his nonreferral. Thereafter, Martinez went home. He testified that it was his expectation to be employed by any company other than Shore thereafter.

Martinez' testimony presents some probability difficulties. First, if he were told by Joseph initially that he was nonreferred to Shore and understood so, it is likely that he would have attended the October 24 shape to obtain work from other employers, including Lakes, inasmuch as he testified that he had been unaware of the reciprocity agreements. If he understood Joseph's second alleged statement that he was nonreferred through the hall to mean universal nonreferral, which he elsewhere testified was his understanding of the effect of any nonreferred discharge, why did he expect to be referred to other employers the next day?

Joseph testified that in midday on October 24, he prepared and caused to be typed a letter of notification to Martinez that included a universal nonreferral penalty. He testified that he wrote the letter to make certain that his oral notification was accurate and understandable. However, he admitted the letter was in error and claimed he did not learn of the error until the investigation of this charge by a Board agent. He gave no explanation of how the error could have occurred. He admitted that he issued no retracting letter even after that discovery.

According to Joseph, because he had drafted the letter after 1 p.m. mail pickup for U.S. mail posting, he did not mail the letter until 1 p.m. on October 25. He testified that he tendered no copy of that letter to Martinez in person. Martinez was confused and uncertain as to when he actually received a copy of that letter. He hesitantly testified that he believed that he received it on October 24 when Joseph handed it to him during the morning shape hiring process. He admitted that it was possible that this occurred on October 25.

Martinez testified that he appeared at the October 25 shape, expecting to be referred to any employer other than Shore. According to him, when his name was not announced during the shape, he approached Bundy, head checker for the Lakes terminal, and asked to be hired. According to Martinez, Joseph intervened and told him that he was on a nonreferral list and will not work "anywhere" at this port anytime."

Martinez confused the facts even further. In cross-examination, after explaining that he expected to be employed by any employer other than Shore, he testified that having told him on October 24 that he was discharged from Shore, Joseph stated:

> He said I was fired [on October 24] so I was thinking I would go to another company and that is when [October 25] he told me I was fired period, I would not work anywhere.

Martinez testified that he, therefore, did not sign in but proceeded to seek out other union "trustees" on the dock.

Martinez testified that he talked to Maurice Franklin and Mark Paz, whom he identified as union trustees, and requested in writing an inquiry committee hearing by the union executive board to review the "Issue of being non-referral [sic] as soon as possible." "It was hand-dated 10–25–96." Joseph testified that on October 24, he had received a report that Martinez had requested such a hearing and that he readily agreed to hold one on Monday, October 28, because Franklin had already scheduled another case for that day.

The meeting was held. Martinez did not attend. He testified that he was not notified. There is no testimonial evidence of his notification. Joseph and others testified that the members of the committee discussed the merit of Shore's discharge and that Joseph stated that in consequence, Martinez would be referred to employers other than Shore and Lakes. There is no evidence that the statement was in any form conveyed to Martinez. He testified that it was not.

At a February 1996 unemployment compensation hearing held on the issue of an appeal of a denial of Martinez' claim, Joseph was subpoenaed as a Shore witness. He testified that in his testimony there, he, inter alia, explained that Martinez was nonreferred from Shore and Lakes but could be referred to work at other employers. Why this was relevant to the issue of unemployment compensation was not explained. No transcript was proffered to corroborate Joseph.

Martinez could not testify with any certitude that such statement was not made. At best, he testified that he did not hear it. He admitted that he had difficulty hearing people at that hearing unless they "speak up."

Martinez testified in direct examination, in contradiction to Joseph, that he appeared at the hall on unspecified subsequent dates but was never referred. He did not explain why he bothered to appear after being notified of universal nonreferral. He gave no details and failed to testify as to whether or not his name was called or whether he actually attempted to be referred to any nonreciprocal employer or whether he signed in. Joseph testified that Martinez would have been referred to S. H. Bell on October 29 had he so desired and any other nonreciprocal employer thereafter had he appeared at subsequent shapes (98 percent of which Joseph supervised), which he did not. Joseph also testified that there are no records reflecting that Martinez had signed in after October 24, 1996. The General Counsel proffered no such subpoenaed documents. I credit Joseph on the point.

Martinez admitted that the nonreciprocal employers provide "a lot less" sporadic employment and he would not have obtained as much work or income from them combined, as he would have from Shores and Lakes. Martinez did not contradict testimony that S. H. Bell had been hiring on October 24, and he did not explain why he failed to seek a referral to Bell on that date, nor why he did not remain for the remainder of the shape that day in light of his testimony that he expected to be employed by any other employer until he was allegedly informed to the contrary on October 25.

Without contradiction, Joseph testified that in March 1997, the Union received a written request from Martinez for a calculation of his retirement fund and that Martinez' attorney informed him in October 1997 of Martinez' intent to withdraw his retirement funds, which can only be accomplished upon retirement. There is no evidence that he did retire.

3. Credibility resolutions

With respect to what Joseph said to Martinez about job referral and when he said it poses a very difficult credibility resolution. Two witnesses corroborate Joseph. However, neither of them is completely disinterested. One is a union official. All arguably, to some extent, might have a disinclination to testify

adversely to that of a person in a position to affect their job referral or job status, if even to a remote extent. Furthermore, although they were generally fluent witnesses, when it came to the narration of what was said, they delivered their responses in a most rote-like manner as if according to a memorized script. Further, the October 24 letter from Joseph states precisely what Martinez testified that Joseph told him orally. Martinez, however, is not the most convincing witness either in his uncertain, hesitant demeanor or in the substance of his testimony as noted above with respect to the improbabilities it raised. Further, Martinez gave the impression of either being an inattentive listener or a listener with hearing problems who might perceive to have been said as what he expected to be said. He admitted hearing problems, not only with respect to the unemployment hearing testimony but also with respect to what was said in testimony at the instant trial. He testified that he had assumed that nonreferral to one employer automatically meant universal nonreferral and, thus, he might have assumed that this is what the thrust of what Joseph said to him. Yet, his behavior and understanding following the alleged October 24 conversation suggests otherwise. Furthermore, his nonappearance at the subsequent shapes, if Joseph is credited, can be explained only by either the fact that he was told by Joseph of his universal nonreferral or he relied on a subsequently received letter of universal nonreferral notification and concluded that any further appearance was futile. There is simply insufficient evidence to support the Respondent's argument that any nonreciprocal work was too little to make it worth his while. We do not know what, if any, other work he actually obtained elsewhere to compare with what he might have obtained through the hiring hall. The evidence of such referrals indicated that such work was available but is inconclusive as to the actual extent of it. The Respondent's defense as to Martinez' motivation rests upon pure unfounded speculation.

With respect to when Martinez received the October 24 letter, his testimony was exceptionally weak and unconvincing. I must credit Joseph's testimony that he directed the typing of that letter after the October 24 confrontation and caused it to be mailed at 1 p.m. on October 25 either after no further conversation with Martinez or, if Martinez is credited, prepared before but mailed after the morning confrontation of October 25. Under either version, it is the last official unrescinded, written communication most certainly received by Martinez after his oral confrontations with Joseph.

Joseph's testimony as to having been responsible for the actual typing of the October 24 letter and yet having not been aware that it contained a universal nonreferral punishment is inexplicable and incredible. He offered no explanation of just how he could possibly have been unaware of the substance of what he actually caused to be typed in the fourth line of the first paragraph of a two-paragraph letter signed by him. He did not even try to explain that he utilized a secretary who might have misunderstood his dictation and that he failed to proofread her typed copy. Indeed, he even failed to testify that someone else, not he, did the typing. Further, it is incomprehensible that he would not have proofread that letter, which he conceded was formulated in the first place pursuant to past practice, to assure an accurate memorialization of what had been stated in a contentious confrontation.

I find that Joseph's blithe, cryptic defense of an unexplained "error," never thereafter retracted in writing even after discovery, strains credulity. I conclude that the credibility balance is tipped slightly in favor of Martinez. I find that the letter confirmed Joseph's oral statement of universal nonreferral. However, I am not at all certain whether Martinez was told of a universal nonreferral on October 24 or 25, but I conclude that it makes no difference under either version because I find that he received the official written notification of such thereafter. I conclude that even if Joseph were to be credited, an official written communication on union letterhead correspondence, to a normally reasonable person, would take precedence over any prior oral statements.[2] Thus, according to Joseph, Martinez failed to appear for subsequent shapes.

As to Joseph's motivation, there is an absence of evidence as to whether it was due to reasons other than negligence, i.e., some preexisting animus, a temporary lapse of understanding, or an irritation with Martinez arising from their confrontations—Martinez did temporarily disrupt the shape according to Joseph.

4. Analysis

The Supreme Court held that a union owes its members fair representation but that it will be permitted a wide range of discretion in the performance of its duties. *Ford v. Huffman*, 345 U.S. 330 (1953). In *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), the Court further held that a union breaches its representational duty when its conduct toward a bargaining unit member is "arbitrary, discriminatory or in bad faith."

In *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), the Court stated that the *Vaca* standard "applies to all union activity."

The Board has applied the foregoing court standard to a variety of fair representation issues. For a discussion of the evolution and application of this standard, see *California Saw & Knife Works*, 320 NLRB 224, 228–230 (1995), enfd. 133 F.2d 1012 (7th Cir. 1998), cert. denied 119 S.Ct. 47 (1998), where the Board announced that it would apply the *Vaca–O'Neill* standard to issues arising under *Communications Workers v. Beck*, 487 U.S. 735 (1988).

In *Teamsters Local 101 (Allied Signal)*, 308 NLRB 140 (1992), the Board adopted the administrative law judge's finding that the General Counsel had the burden of establishing animus toward a group of unit members with respect to a grievance settlement distribution. The judge reviewing, inter alia, *O'Neill* and *Vaca*, supra, and *Steelworkers v. Rawson*, 110 S.Ct. 1904, 1911 (1990), also held that it was the burden of the General Counsel to prove that a union's conduct with respect to an arbitration award distribution was "unfair, arbitrary, capricious, and invidious. In *Letter Carriers Branch 6070 (Postal Service)*, 316 NLRB 235, 236 (1995), in another grievance settlement distribution issue case, it was held, "mere negligence does not constitute a breach of the duty of fair representation," citing, inter alia, *Rawson*, supra.

In *California Saw*, supra at 34 fn 230, the Board declined to address the issue of "whether there is a higher threshold to be met within the 'arbitrary, discriminatory or bad faith' standard for hiring hall cases." See *Plumbers Local 32 v. NLRB*, 50 F.3d 29, 34 (1995).

[2] This is particularly so because the October 24, 1996 notification letter taken to the post office at 1 p.m. Friday would most probably have been delivered after the scheduled Monday, October 28 committee of inquiry review meeting, which Martinez had been informed of shortly thereafter on the same day.

Clearly, when in the operation of an exclusive job referral hiring hall, an unlawfully motivated union arbitrarily and intentionally breaches its referral procedure contractual standard to the disadvantage of another unit member, it violates the Act. *Painters Local 1115 (C & O Painting)*, 312 NLRB 1036 (1993). As the General Counsel argues, when, in the operation of an exclusive hiring hall, a labor organization violates its own operational standards and rules to the adversity of one of its bargaining members, the Board has held that upon such showing, it is incumbent upon the Union to demonstrate some reasonable justification; and failing such explanation, it will be found to have acted arbitrarily without the need for the General Counsel to prove specific evidence of unlawful motivation, citing *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995); and *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992). In the latter case, the Board further stated that negligence is no defense.

The General Counsel, however, must prove that adverse treatment in effect had occurred beyond a mere suspicion. *Laborers Local 423 (G.F.C.)*, 313 NLRB 807, 812 (1994); *Operating Engineers Local 137 (Various Employers)*, 317 NLRB 909, 910–911, 923 (1995).

The General Counsel in this case has proven that the Respondent has violated its own contractually founded exclusive job referral hiring hall rules and procedures by issuing an official written notification of universal nonreferrability to Martinez, confirmed by concurrent similar oral notification. The General Counsel has demonstrated that some nonreciprocal employer work was available to Martinez after that notification. By its own admission, Martinez did not obtain subsequent referral from the Respondent of any kind. The Respondent argues that Martinez failed to appear at subsequent shapes, but it would have been futile for him to do so having been informed orally and in writing of his nonreferral status. The extent of work available cannot be determined conclusively by the evidence in this record nor whether Martinez at some later point abandoned efforts to obtain job referral. Those issues must be left for compliance proceedings. Clearly, however, he suffered some adverse consequence of the Union's violation of its own hiring hall operating rules and procedures, which violation was not adequately explained by the Respondent. However, under current Board precedent, as I read it, the General Counsel has established a prima facie showing of arbitrary conduct which was not rebutted and, in any event, the Respondent's proffered defense of negligence is no valid defense according to unreversed Board precedent. Accordingly, I find that the Respondent has violated the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. As found above, Shore Services and Beta Steel Corp. are employers engaged in commerce within the meaning of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has maintained exclusive hiring hall agreements at the Port of Indiana with several employers with which it is party to collective-bargaining agreements, including but not necessarily limited to: Shore Services; Lakes and Rivers Transfer, a division of Jack Grey Transport; Brown Incorporated; Rogers Grain and Terminals, American Grain, S. H. Bell, and Tanco Terminals.

4. By its refusal to refer Jesse Martinez to employment with all employers with which it has maintained an exclusive hiring agreement at the Port of Indiana, excluding Shore Services and Lakes and Rivers Transport, since October 24, 1996, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(11) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(b)(1)(A) and (2) of the Act, I recommend it be ordered to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully denied Jesse Martinez referral to certain employers at the Port of Indiana, I recommend that the Respondent be ordered to make him whole for any loss of earnings suffered as a result of this unlawful conduct by paying him backpay equal to the amount of wages that he would have earned had he not been denied such referral since October 24, 1996, less any net earnings. Backpay and interest is to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, I recommend that the Respondent be ordered to restore Jesse Martinez to the job referral seniority rank to which he would have been entitled had he been properly referred to those employers. I recommend that the determination of the nature and extent of Martinez' employment opportunities at those employers and his job referral seniority rank be left to compliance proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, International Longshoremen's Association, Local 1969, Great Lakes District Council, Atlantic Coast District, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to refer Jesse Martinez, its member in good standing, to employment by employers with which it maintains an exclusive hiring hall agreement at the Port of Indiana, excluding Shore Services and Lakes and Rivers Transport.

(b) In any like or related manner breaching its duty of fair representation for all its members in the operation of its hiring hall.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and operate its hiring hall and job referral system in a nondiscriminatory manner.

(b) Make whole Jesse Martinez for any loss of earnings suffered as a result of the discrimination against him by payment to him of sums of money and other benefits equal to that he would have earned, and restore to him the job referral seniority rank he would have been entitled but for the Respondent's discrimination against him in the manner set forth in the remedy section of this decision.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, hiring hall job referral records of any kind, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and to determine the job referral seniority rank entitled to Jesse Martinez.

(d) Within 14 days after service by the Region, post at its business office and meeting places copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."